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Newsroom: Good Reason for Secrecy on 38 Studios 8/12/2016

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Newsroom

August 12, 2016

Good Reason for Secrecy on 38 Studios

In a Providence Journal Op-Ed, Professor Niki Kuckes argues that -- despite extensive criticism -- legitimate reasons support keeping 38 Studios investigation private.

- *Read and listen to Professor Kuckes on [Rhode Island's NPR on 38 Studios](#).*
- *Professor Kuckes quoted in an earlier [Providence Journal article on 38 Studios](#).*

[Good reason for secrecy on 38 Studios](#)

By Niki Kuckes



Aug. 9, 2016: Late last month, Attorney General Peter Kilmartin and State Police Supt. Steven O'Donnell announced that they will not — for now at least — seek criminal indictments for the failed 38 Studios bond offering. Nor will they seek to make public the evidence from their four-year investigation, which is inactive but still open.

Strong criticism has followed, and demands for full disclosure of the 38 Studios evidence. The Providence Journal, in an Aug. 2 editorial ("Share truth about 38 Studios"), decried the "stubborn refusal" of the prosecutor and police to share information and urged that "full information" be made public. Similar

requests were made by House Speaker Nicholas Mattiello and by five public interest groups in a thoughtful open letter.

According to the editorial, the attorney general's stand against disclosing the 38 Studios records "smells" and helps make the public "bitterly cynical" about Rhode Island's leadership. The attorney general counters that he made a responsible, non-political decision that confidentiality serves the public interest while criminal charges still remain possible. Where does the truth lie?

This question cannot be answered without background knowledge. As Rhode Island's public records law reflects, in general, government records should be public. Transparency is a critical public value. On the other hand, valid reasons support guarding the confidentiality of grand jury investigations.

Prohibiting disclosures that could show the direction of a grand jury's inquiries helps prevent targets from fleeing, encourages witnesses to be forthcoming, and reduces witness or juror tampering or the destruction of evidence. After an investigation ends, secrecy protects the reputation of grand jury subjects, especially those not criminally charged. Prosecutors take grand jury secrecy very seriously, as do the courts, as does the Rhode Island legislature, which made unlawful disclosure of grand jury information a criminal offense.

Two points are worth making in the 38 Studios matter. First, grand jury secrecy is broader than is generally understood. Grand jury secrecy is not limited to the four walls of the grand jury room. Instead, it bars any disclosure that could reveal "matters occurring before the grand jury." According to the Rhode Island Supreme Court, this covers not only witness names and testimony but anything that could reveal some secret aspect of the grand jury's investigation, such as its direction or strategy. Though not all evidence in the 38 Studios investigation will likely be a grand jury secret, much is potentially covered, and the determination complex.

Second, a prosecutor has no power to make grand jury records public. Disclosures to persons outside the investigatory process require a court order, which can be issued only if a few narrow exceptions apply. Courts can authorize grand jury disclosures, for example, to federal investigators, or where needed for a judicial proceeding (this permits disclosing grand jury records to the criminal defendant or, more rarely, to parties or witnesses in related civil litigation). A grand jury witness has a First Amendment right to discuss his or her testimony. But there is no exception in the grand jury rules that allows a court to order disclosures solely to promote transparency. Page 2 of 2 - In past instances in which grand jury records have been publicly shared — notably, the Station fire and Cornel Young Jr. cases — the court tied the grand jury disclosures to related civil litigation (a recognized exception) and found the need for secrecy had diminished. In the Young case, the targets of the closed grand jury investigation supported disclosing

the records, while in Station fire litigation, the grand jury records had already been revealed to the defendants for their criminal trial.

A similar motion may be made in the 38 Studios civil litigation, and if so, the attorney general can choose to support disclosure or to argue that grand jury secrecy is still needed (as did then-Attorney General Sheldon Whitehouse in response to the disclosure request in Young). Critics may disagree. But there is no evidence here that the attorney general's refusal to initiate public disclosure of the 38 Studios grand jury records reflects cronyism, malfeasance, or anything other than a good faith prosecutorial judgment. If a smell is wafting from the 38 Studios fiasco, we should look to other sources.

Niki Kuckes is a professor of law at Roger Williams University School of Law.